

Tort of Negligent Misstatement

Development of Law

What follows is a summary of the key cases that have charted the development of the tort of negligent conduct and misstatement. It is interesting to note the way the law, based on the principles set out in *Donoghue v. Stevenson*, started by moving away from that case and has now come full circle. It is also interesting that some key cases are remembered because the person seeking damages lost: these cases are good examples of how the outcome of a case is less important than the principles it applies.

Candler v. Crane, Christmas & Co (1951) 2 KB 164 (Plaintiff Lost)

Until 1964 the law said that, except in very exceptional circumstances or in cases where there was a contractual relationship, damages could not be recovered for financial injury. The facts in Candler's case were as follows.

A firm of accountants prepared the financial statements of a limited company, knowing that the documents would be shown to a potential investor. The documents, which did not represent the true state of affairs, were relied on by the investor who suffered financial loss as a result. On appeal the court held that, in the absence of a contract, the firm owed no duty of care to the investor.

Lord Denning, however, disagreed with the rest of the court, saying that a duty of care was owed in tort and not in contract and that there should be no difference between physical damage and financial damage.

Hedley Byrne & Co v. Heller Partners Ltd (1964) AC 465 (Plaintiff lost)

The decision of the court of Appeal in Candler's case was much criticised and in 1964 the House of Lords, in Hedley Byrnes case, approved the dissenting judgement of Lord Denning and unanimously agreed that Candler's case was 'Wrongly decided'. The facts of Hedley Byrne's case were as follows.

Hedley Byrne requested its own bank to enquire through a second bank on the financial stability of a company. The second bank prepared a report upon which Hedley Byrne acted, but lost money as it contained erroneous and misleading information. The second bank headed its report with the words: 'For your private use and without responsibility on the part of this bank or its officials'. In view of these words disclaiming liability, the House of Lords held that no duty of care was accepted by the second bank and none arose. Therefore, the claim by Hedley Byrne for damages to compensate for financial loss, resulting from negligent misstatement, failed.

The House of Lords, however, also considered what the legal position would have been had the report not carried a disclaimer and held that, in appropriate circumstances, a duty of care would arise where an innocent, as opposed to a fraudulent, misrepresentation was made; the fact that the sole damage was a financial loss did not affect the question of liability.

The court considered that persons possessed of some special skills, such as doctors, had long been held liable for their negligent acts in tort even when they had not acted for a fee and, therefore, could not be sued in contract. This liability was based on a relationship similar to contract, the basis being either a holding out of the possession of

a skill and a willingness to use it or an express or implied undertaking of responsibility. The court ruled that the same principle applied to liability for negligent advice.

Some of the judges in Hedley Byrne formulated a much wider proposition. Where a person was in a position in which others could reasonably rely upon that person's judgement, skill and ability to give advice and make enquiries, and that person took it upon himself or herself to give advice and allow it to be passed on to others that would rely on it (or who should have known from the circumstances that others would rely on it) a legal duty to use care in giving the advice would arise. Thus the basis of the decision was that a special relationship existed between the parties.

Hence, the House of Lords in the Hedley Byrne decision held that a person giving advice or information could be liable to a third party where it was not unreasonable for that third party to rely on the information or advice. The relevance of this decision in the context of companies and securities law is important as many reports and statements are prepared by professional people for

companies whose securities may be traded on the basis of this information. The decision in the Hedley Byrne case intimated that a duty of care was owed by the provider of the information, not only to the immediate recipient but also to others who might reasonably rely on it.

This decision has been cited with approval in *Chin Sin Motor Works Sdn. Bhd. & Anor. v. Arosa Development Sdn. Bhd. a Anor.* [1992] 1 MU 235.

Mutual Life a Citizens Assurance Co Ltd v. Evatt (1968)122 CLR 628 (Plaintiff Lost)

In the MLC case, Mr Evatt sought damages against MLC whose officers, in response to his enquiry, had advised him it was safe to invest in a subsidiary of MLC. It failed shortly afterwards and Evatt suffered financial loss.

The court said that it was essential for the person making the statement to have claimed that he or she possessed special skills and competence. The officers of MLC had not expressly professed any special skill or competence nor could any profession or expertise be implied from their position. Mr Evatt's claim, therefore, failed.

Esso Petroleum v. Mardon [1976] QB 801 (Plaintiff Won)

There may be a duty of care where one person with specialist knowledge or skill makes representations to another by way of advice, information or opinion with the intention of inducing that person to enter into a contract.

This case involved a negligent estimate by Esso concerning the likely throughput of a filling station. The throughput was the subject of a lease agreement for the filling station.

It was held that a court action for negligent misstatement is possible, in addition to action for a breach of a warranty incorporated into the contract between the parties.